ORIGINAL

NO. 03-9560
IN THE UNITED STATES SUPREME COURT

OCTOBER 2003 TERM

MARLON LATODD HOWELL, AKA MARLON COX, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. **WHERE THE PETITIONER FAILED TO ASK THE COURT BELOW TO APPLY *ALABAMA V. BECK* AND SUBSEQUENT PRECEDENT OF THIS COURT, THE PETITIONER HAS FAILED TO PRESENT THE QUESTION AT THE PROPER TIME OR IN THE PROPER MANNER; THEREFORE, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM, AND CERTIORARI SHOULD BE DENIED.**

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported at *Howell v. State*, 860 So. 2d 704 (Miss. 2003). This opinion is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. § 1257. He fails to do so.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the U.S. CONST., AMEND. VIII and XIV. He fails to do so.

STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the May 15, 2000, capital murder of Hugh David Pernell, a retired postal worker who was delivering newspapers on a residential street in New Albany, Mississippi, in the early morning hours of that tragic day. Shortly after 5:00 a.m., Pernell was flagged down by another vehicle (which was occupied by Petitioner Marlon Howell and his friends co-indictees Adam Ray and Curtis Lipsey). Petitioner approached the driver's window of Pernell's car and shot Pernell in the heart with a Saturday Night Special. Pernell's foot hit the gas pedal, and his vehicle sped into another car that was parked in a nearby driveway. As a result, Petitioner Howell, Lipsey, and Ray fled the scene.

The murder occurred in front of the home of Charles Rice, who was watching television in his living room as he prepared for work. Rice, prompted by the sound of a horn honking, went to his window. From this vantage point, he saw the two cars come to a stop and he then witnessed the entire crime. The next day, Rice viewed a lineup and unequivocally identified Petitioner as the killer.

The motive for the crime was robbery. Petitioner and his friends had been riding around all night. Petitioner was looking for someone to rob, because he owed supervision

and other fees to his probation officer. Petitioner had received documents that indicated he would be jailed, if payment was not made that very day – May 15, 2000. As Petitioner stated to his friends, he "needed to make a sting," and he was looking for "an easy lick." Otherwise, he would be "locked up."[1]

By 5:00 a.m., when Petitioner saw Pernell driving down the street, Petitioner was desperate. When Pernell sped away from the scene, Petitioner's plans were foiled. Petitioner Howell, Lipsey, and Ray went immediately to the home of their friend, Brandon Shaw. Lipsey and Ray told Shaw that Petitioner Howell "shot somebody." Petitioner asked Shaw to take him home immediately. Petitioner hid the murder weapon behind Shaw's house, and Shaw took Petitioner home to Blue Mountain, Mississippi. Petitioner Howell, known by his cohorts as "Chiefa", ordered all those involved not to tell anyone.

Contrary to Petitioner's direction, his friends confessed to authorities the next day. When subsequently questioned by the police, Petitioner Howell claimed to have been in Corinth, Mississippi with a woman all night. However, at trial, Petitioner's family testified that he was at home in Blue Mountain at the time of the crime. The facts of this case, as found by the Mississippi Supreme Court, are more explicitly detailed in paragraphs two through nineteen of the opinion below. *See Howell*, 860 So. 2d at 712-15.

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[1]Petitioner asserts that "[t]he evidence of attempted robbery was weak." This assertion is clearly contrary to the Mississippi Supreme Court's detailed findings and ultimate conclusion that there was "ample" evidence on this point. *Howell*, 860 So. 2d at 738-39.

B. Procedural History

On June 29, 2000, Petitioner was indicted (along with Curtis W. Lipsey and Adam Ray) for capital murder. In March, 2001, Petitioner was tried before the Union County Circuit Court and convicted of capital murder. A separate sentencing hearing was conducted, after which, the jury found the following:

> 1. That the defendant actually killed Hugh David Pernell.
> 2. That the defendant, Marlon LaTodd [sic], attempted to kill Hugh David Pernell.
> 4. That the defendant contemplated that lethal force would be employed.
>
> Next, we, the jury, unanimously find that the aggraviting [sic] circumstances of:
>
> 1. The capital offense was committed by a person under sentence of imprisonment, probation or parole.
> 2. The capital offense was committed for pecuniary gain during the course of a robbery.
>
> exist beyond a reasonable doubt and are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we unanimously find that the defendant, Marlon LaTodd Howell, should suffer death.
>
> /s/ Greg Langston
> Foreman of the Jury

Thereafter, Petitioner's Motion for a New Trial was denied. He appealed to the Supreme Court of Mississippi and raised the following issues for consideration by that court:

I. Whether the trial court erred in denying a change of venue.

II. Whether the trial court erred in denying Howell access to county funds in order to employ an investigator, a jury consultant, a daily transcript, and additional counsel to assist with his defense.

III. Whether the trial court erred in failing to quash the jury panel.

IV. Whether the trial court erred in finding that the State's use of peremptory strikes did not violate *Batson*.

V. Whether the trial court erred in denying Howell's request for individual sequestered voir dire.

VI. Whether the trial court erred in limiting Howell's voir dire examination.

VII. Whether the trial court erred in admitting Rice's eyewitness identification testimony.

VIII. Whether the trial court erred in admitting Howell's statement.

IX. Whether the trial court erred in allowing witnesses to testify as to statements that Howell made.

X. Whether the trial court erred in allowing Shaw to testify as to statements made by co-defendant, Ray.

XI. Whether the trial court erred in refusing to allow Howell to re-cross-examine Shaw after the State's re-direct examination.

XII. Whether the trial court erred in denying Howell's request for a directed verdict.

XIII. Whether the trial court erred in granting the State's instruction S-2, which referred to attempted robbery; and whether Mississippi Code Annotated, Section 97-3-19 does not specifically enumerated attempted robbery as an underlying offense for conviction of capital murder.

XIV. Whether the trial court erred in granting the State's instruction S-6 which did not instruct the jury on simple murder and manslaughter; and whether the trial court erred in denying Howell's instructions D-13 and D-18 on the crime of simple murder and manslaughter.

XV. Whether the trial court erred in denying instruction D-3 on the weight of the evidence.

XVI. Whether the trial court erred in denying instruction D-8 on the jury's consideration of testimony of a law enforcement officer.

XVII. Whether the trial court erred in denying instruction D-16 as to cross-racial eyewitness identification.

XVIII. Whether the trial court erred in denying Howell's motion for a mistrial and renewed motion for change of venue based upon a juror's father allegedly sitting on front row of audience with victim's family.

XIX. Whether the trial court erred in allowing the district attorney, in closing argument, to refer to Howell's failure to tell somebody about his alibi defense or give details.

XX. Whether the trial court erred in denying a twenty-four (24) hour "cooling off" period before the jury considered sentencing.

XXI. Whether the trial court erred in the sentencing phase by allowing evidence of Howell's previous conviction for possession of marijuana as an aggravating factor.

XXII. Whether the trial court erred in the sentencing phase by allowing evidence of fees due from Howell during his probation as double use of the same robbery element and pecuniary gain element in the guilt and sentencing phase.

XXIII. Whether the trial court erred in the sentencing phase by allowing the introduction of the indictment against Howell on a charge of sale of controlled substance, marijuana.

XXIV. Whether the trial court erred in granting sentencing instruction S-2 because it allegedly removed the issue of sympathy and mercy from consideration by the jury, improperly listed aggravating factors of imprisonment and pecuniary gain, and failed to instruct the jury on how to properly weigh mitigating factor against aggravating facts and define what mitigating and aggravating factors are.

XXV. Whether the trial court erred in denying Howell's sentencing instruction.

XXVI. Whether the trial court erred in the sentencing phase by allowing the district attorney to refer to the victim, Pernell, his work, his loss, and what Pernell might say if he were still alive.

XXVII. Whether the trial court erred in denying Howell's post-trial motion for a new trial.

Howell, 860 So. 2d at 715-17.

In addition, the Mississippi Supreme Court, pursuant to state statute, considered *sua sponte* the following issue:

XXVIII. Whether the imposition of the death penalty is excessive or disproportionate in this case.

Id. at 717, 764-65.

The Supreme Court of Mississippi rejected Petitioner's claims and affirmed his conviction and sentence October 23, 2003. Petitioner's subsequent motion for rehearing was denied December 18, 2003. From this affirmance, Howell brings the instant petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner raises one claim, which is wholly unsupported by and contradictory to the actual record in this case. Because Petitioner raises this claim for the first time in his petition for writ of certiorari, the claim is not within the jurisdiction of this honorable Court. Ultimately, Petitioner presents no cognizable claim under the Constitution or statutes of the

United States upon which relief can be granted. Therefore, the State of Mississippi respectfully submits that certiorari should be denied.

ARGUMENT

I. WHERE THE PETITIONER FAILED TO ASK THE COURT BELOW TO APPLY *ALABAMA V. BECK* AND SUBSEQUENT PRECEDENT OF THIS COURT, THE PETITIONER HAS FAILED TO PRESENT THE QUESTION AT THE PROPER TIME OR IN THE PROPER MANNER; THEREFORE, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM, AND CERTIORARI SHOULD BE DENIED.

Petitioner asserts that he was improperly denied an instruction on the lesser-included offense of murder,[2] in violation of the Eighth and Fourteenth Amendments. In support of his argument, Petitioner cites *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382 (1980), and its progeny. This constitutional argument was not raised before the Mississippi Supreme Court. Therefore, Respondent respectfully submits that this Court is without jurisdiction to hear this issue. *See Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1162 (1969).

Rather, the only issue before the Supreme Court of Mississippi was whether, under Mississippi law, the evidence was sufficient to support a murder instruction.[3] *Howell*, 860

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[2]As noted elsewhere herein, Petitioner raised before the State courts the sufficiency of the evidence to support both a murder instruction and a manslaughter instruction. It appears that Petitioner has abandoned his previous claim regarding the denial of the manslaughter instruction and is only raising the denial of the murder instruction before this Court.

[3]Indeed, as Petitioner acknowledges, the Mississippi Supreme Court in considering the issue before it (*i.e.*: the sufficiency of the evidence to support lesser included offense instructions) did not "address the federal constitution." (Petition at 3). This is because the Mississippi Supreme Court was never asked to consider, much less "address", the federal constitutional claims now raised by

So. 2d at 741-44. As the Mississippi Supreme Court clearly held, the evidence in this case did not support a murder instruction. Therefore, Petitioner's claim to the contrary is without factual basis.[4] *See, generally, Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct 2781, 2789 (1979) (setting forth deferential standard of review for factual issues determined by State court).

It is also noteworthy that – even if this Court had jurisdiction of this question (which is disputed) – *Beck* and the subsequent cases cited by Petitioner do not apply in a case where the evidence fails to support a murder instruction.

> The *Beck* opinion considered the alternatives open to a jury which is constrained by a preclusion clause and therefore unable to convict a defendant of a lesser included offense when there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense. In such a situation, we concluded, a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime. 447 U.S., at 642, 100 S.Ct., at 2391. Or a jury might acquit because it does not think the crime warrants death, even if it concludes that the defendant is guilty of a lesser offense. *Id.*, at 642-643, 100 S.Ct., at 2391-2392. While in some cases a defendant might profit from the preclusion clause, we concluded that "in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 643, 100 S.Ct., at 2392.
>
> The Court of Appeals, quoting this statement from our *Beck* opinion, repeatedly stressed the words "in every case." 639 F.2d, at 223-224; 628

Petitioner before this Court.

[4]Howell alleges that the jury could have believed that he approached the vehicle to sell Pernell drugs. There was no such evidence presented at trial, and Howell cites to no such evidence that was submitted to the jury. The only evidence before the jury was that Howell needed money to pay his probation officer that day. He had ridden around all night looking for someone to rob, and, finally, he besieged the victim in this case.

F.2d, at 401. It concluded that we meant that the Alabama preclusion clause was a "brooding omnipresence" which might "infect virtually every aspect of any capital defendant's trial from beginning to end." *Ibid.* **It is important to note that our holding in *Beck* was limited to the question submitted on certiorari, and we expressly pointed out that we granted the writ in that case to decide whether a jury must be permitted to convict a defendant of a lesser included offense "when the evidence would have supported such a verdict."** 447 U.S., at 627, 100 S.Ct., at 2384. Thus, our holding was that the jury must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."

* * *

Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But **due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction.** The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, 456 U.S. 605, 610-11, 102 S. Ct. 2049, 2052-53 (1982) (emphasis added).

Thus, *Beck* has basically been limited to its own facts, and does not apply to the instant case. *See Id. See also Hopkins v. Reeves*, 524 U.S. 88, 98-99, 118 S.Ct. 1895, 1901-02 (1998) (holding that *Beck* does not apply where state statute is distinguishable, in that manslaughter is not a lesser-included offense under Nebraska law). In addition, the *Beck* case is also wholly distinguishable because the Alabama statute at issue in *Beck* "specifically prohibited [the trial judge] from giving the jury the option of convicting the defendant of a lesser included offense." *Beck*, 447 U.S. at 628, 100 S. Ct. at 2384.

Mississippi's capital sentencing scheme contains no such preclusion clause.[5] For all these reasons, Petitioner's arguments on this point are, not only beyond the scope of this Court's jurisdiction, but they are also without merit.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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STATE OF MISSISSIPPI

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[5]To the contrary, under Mississippi law, "[a] lesser-included offense instruction is required only 'where a reasonable juror could not on the evidence exclude the lesser-included offense beyond a reasonable doubt.'" *Jackson v. State*, 684 So. 2d 1213, 1229 (Miss. 1996) (quoting *Mackbee v. State*, 575 So. 2d 16, 23 (Miss. 1990). *See also* Miss Code Ann. § 99-17-20 (cited by Petitioner) ("The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused.").

CERTIFICATE

I, Judy Thomas Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above **Brief in Opposition** to the following:

Andre de Gruy
Counsel for Petitioner, and
Counsel of Record
510 George Street, Suite 300
Jackson, MS 39202

Duncan Lott
Counsel for Petitioner
P.O. Box 382
Booneville, MS 38829

This the 20th day of April, 2004.

Judy Thomas Martin
JUDY THOMAS MARTIN

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

JIM HOOD
ATTORNEY GENERAL

CAPITAL LITIGATION DIVISION

April 20, 2004

Honorable Chris Vasil
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: Marlon Latodd Howell, a/k/a Marlon Cox v. State of Mississippi
NO: 03-9560

Dear Clerk:

Enclosed for filing please find the original and ten (10) copies of respondent's **BRIEF IN OPPOSITION** in the above styled and numbered cause. By copy of this letter I am serving counsel opposite.

Thank you for your assistance in this matter.

Sincerely,

Judy T. Martin
Special Assistant Attorney General

JTM/dsm

Enclosures

cc: Andre de Gruy, Esquire
Duncan Lott, Esquire

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